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IN THE SUPREME COURT

OF THE UNITED STATES

NO. _____

NEWTON GASPARD,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the indictment sufficiently charge the crime of mail fraud in all twelve counts?

   The decisions by the Fifth Circuit require greater specificity in an indictment than found here.

2. Was sufficient evidence presented to exclude every reasonable hypothesis of the defendant's innocence and is mere breach of fiduciary duty now sufficient to constitute mail fraud?

   The decision of the Fifth Circuit is at odds with prior decisions of the Fifth Circuit and several other federal circuits and requires clarification.

3. Were the prosecutor's closing remarks improper and thereby deny defendant of his right to a fair trial?

   Again, the Fifth Circuit decision herein is contrary to the prior decisions of the

Fifth Circuit and of several other federal circuits and requires clarification.

4. Did the trial court adequately present defendant's theory of the case to the jury?

   The decision of the Fifth Circuit in this case is in conflict with the prior decisions of that Circuit and with the decisions of several other federal circuits and requires clarification.

5. Was the cumulative effect of several prejudicial errors sufficient to deny defendant his right to a fair trial?

   The Fifth Circuit decision herein held that none of the alleged errors were prejudicial and ignored their cumulative effect, contrary to the prior decisions of that circuit, requiring clarification.

6. Was the restitution statute, 18 U.S.C. 3579, unconstitutionally applied to this proceeding, depriving defendant of a fair trial?

This presents an important question for review by the Supreme Court of the United States.

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IN THE SUPREME COURT OF THE UNITED STATES

No._____

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Newton Gaspard, who petitions this Honorable Court to issue the Writ of Certiorari to review the ruling of the United States Court of Appeals for the Fifth Circuit, and would show unto the Court the following:

The Ruling Below.

This is a petition for the Writ of Certiorari to review the decision of the Court of appeals for the Fifth Circuit, dated October 9, 1984, being Docket No. 84-4233 in that Court, and reported in the Federal Reporter as 744 F. 2d 438 , and that Court's denial of a petition for rehearing and suggestion for rehearing en banc on November 7, 1984. The said Court refused a stay of its mandate on November 26, 1984, and granted petitioner no further time at all within which to file this petition. The aforesaid rulings are appended to this petition.

Grounds for Jurisdiction.

Petitioner was indicted in the United States District Court for the Western District of Louisiana for alleged violations of 18 U.S.C. 1341, mail fraud.

Petitioner's conviction was appealed by petitioner to the Court of Appeals for the Fifth Circuit, which affirmed and denied rehearing on the dates, supra. The defendant in that prosecution, Newton Gaspard, petitioner herein, brings this petition to review by Certiorari the action of the Court of Appeals. This petition is brought pursuant to the authority of the Supreme Court as set forth in Title 28 U.S.C., §§ 1254(1) and 2106.

Statutes Involved.

The statutory provisions at issue herein are set out verbatim as follows:

CONSTITUTION

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecution, the accused shall enjoy the right to a speedy

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and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 18
CHAPTER 63-MAIL FRAUD

s 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any

conterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such conterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

TITLE 18

s3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), of (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant--

(1) in the case of an offense resulting in damage to or loss of destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible,

impractical, or inadequate, pay an amount equal to the greater of--

(i) the value of the property on the date of the damage, loss, or destruction, of

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devised relating to physical,

psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the Court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in--

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than--

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(g) If such defendant is placed

on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

TITLE 18

s3580. Procedure for issuing order of restitution.

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain

information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in this report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

RULES OF EVIDENCE

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Statement Of The Case.

This was a criminal proceeding instituted in the United States District Court for the Western District of Louisiana by a twelve count indictment, each count alleging a violation of 18 U.S.C. 1341, mail fraud. Counts I through V of the indictment alleged mail fraud violations by virtue of defendant's sale of diesel fuel to his employer, NL Baroid. Counts VI through X of the indictment alleged mail fraud violations due to the providing by defendant of tank cleaning

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services to NL Baroid. Counts XV and XVI of the indictment alleged mail fraud violations based upon NL Baroid's payment for cement actually delivered to private residences.

During the trial, the prosecution introduced several charts and made use of summary testimony to establish, inter alia, the average price per gallon paid wholesale for diesel by defendant, the average price per gallon paid retail for diesel by NL Baroid, and the total amount paid for tank cleaning services by NL Baroid to defendant. The prosecution also elicited testimony, over defendant's objection, of alleged kickbacks to two of defendant's superiors, and of an offer of bribe to another NL Baroid employee.

The prosecution's evidence also established that the defendant had been

employed by NL Baroid for almost twenty-five years at his termination, and had attained the position of District Operating Supervisor. Several of Newton Gaspard's superiors testified that they knew of Newton Gaspard's personal involvement with South State Oil & Gas, Inc., (the diesel business) and with Ed's Tank Cleaning (the tank cleaning business). Despite the Court of Appeals' statement that this testimony was "impugned" by the kickback testimony (Opinion, p.5, 744 F. 2d 438 , 440), there was no showing of same at trial. In fact, one supervisor, Woodrow Wilson, testified that he approached Newton Gaspard for a "kickback," received one payment by check, and returned the check without cashing it. The second supervisor, Travis Kieffer, testified that Newton Gaspard offered him a kickback but

that Kieffer refused the offer. The third supervisor, Dayton King, the second highest ranking NL Baroid employee in the concerned multi-state region, testified as to his knowledge and this knowledge was not tainted or impugned by any kickbacks or other irregularity. Furthermore, all allowed Newton Gaspard to continue his operations. These superiors had knowledge of Newton Gaspard's activities and allowed them to continue. Newton Gaspard knew that these superiors knew of his activities and operated under the good faith impression that everyone with NL Baroid who needed to know and approve of the businesses did so.

As to Counts XV and XVI, the concrete counts, the government's witness testified that he was only 95% certain that NL Baroid paid for concrete delivered to the residences of two of Newton

Gaspard's relatives.

In closing argument, the prosecutor made certain remarks appealing to the passions and prejudices of the jury. Although the Court of Appeals looked disfavorably on the remarks (Opinion, p. 7, nt. 5, 744 F. 2d 438 , 441), it held that they did not constitute reversible error.

The jury returned a verdict of guilty on all twelve counts of the indictment. The trial court denied defendant's motion for judgment of acquittal or for a new trial. The defendant appealed and the Court of Appeals affirmed the convictions holding that the indictment sufficiently charged a crime, that there was sufficient evidence to sustain a conviction and that the other alleged errors were not severe enough to merit either reversal or

consideration. A petition for rehearing and a suggestion for rehearing en banc filed by defendant-appellant, Newton Gaspard, were denied and this Petition for Certiorari results.

ARGUMENT.

A. Insufficiency of Indictment.

One of the points raised by defendant on appeal was that Counts I through X of the indictment failed to charge an offense. The Fifth Circuit held that the indictment was sufficient, but, in doing so, rendered a decision that is in conflict with prior decisions of that Circuit, including those cited by the Fifth Circuit in support of its opinion. The Fifth Circuit held that the contested counts of the indictment herein met the "Kent-Freeman standard." However, an examination of those two cases, United States v. Kent, 608 F. 2d 542 (5th Cir.

1979), and United States v. Freeman, 619 F. 2d 1112 (5th Cir. 1980), reveals an indictment vastly more detailed and specific than the one at issue here. In Freeman, the indictment set forth with great detail and specificity a scheme to deprive investors of money by use of several non-owned oil leases. See United States v. Freeman, supra, at p. 1117, no. 3. In Kent, again the indictment alleged very specifically a scheme to deprive an oil company, by one of its employees, of confidential information, which was used by the employee and others to beat the oil company to the punch in the leasing of attractive parcels. Furthermore, in United States v. Goss, 650 F. 2d 1336 (5th Cir. 1981), the acts charged to have been committed were essentially fraudulent; i.e., the defendants were accused of

selling to the victim a commodity that was designated as crude oil that was not crude oil at all. In United States v. Cauble, 706 F. 2d 1322 (5th Cir. 1983), the court states that the indictment "details the predicate offenses and overt acts with great specificity," and "lists thirty-seven overt acts." 706 F. 2d 1322, 1333. This is the type of indictment that was upheld in Cauble, and the type of indictment that Newton Gaspard contends was necessary in the present case. Counts I through X of the indictment in this case only charge that Newton Gaspard provided NL Baroid with necessary goods and services and made a profit thereby. These are clearly acts that are not criminal in and of themselves. To criminalize these acts and to make a sufficient allegation of mail fraud, something more must be alleged to show the fraudulent acts, the

concealment, and misrepresentation, if any, of defendant. This is clearly necessary because of the universal jurisprudential requirement that in a mail fraud case involving a defendant who owes some sort of fiduciary obligation to the victim, a showing must be made deliberate and fraudulent misrepresentation and concealment by the defendant from the victim which resulted in harm to the victim. See United States v. Barta, 635 F. 2d 999 (2d Cir. 1980); United States v. Mandel, 591 F. 2d 1347 (4th Cir. 1979); United States v. Bohonus, 628 F. 2d 1167 (9th Cir. 1980); and United States v. Ballard, 663 F. 2d 534 (5th Cir. 1981). Clearly, this was not done. The Court's reliance on United States v. Howell, 719 F. 2d 1258 (5th Cir. 1983), is also inapposite because the crime charged there was based upon a simply stated statute, 18

U.S.C. 871, the mere recitation of which, without more, will allege a crime: making a threat to take the life of the President of the United States. In a mail fraud case, however, there exists a much finer line between criminal acts and non-criminal acts. " [T]he statute does not reject all business practices that do not fulfill expectations, nor does it taint every breach of a business contract." United States v. Kreimer, 609 F. 2d 126 (5th Cir. 1980), at p. 128. Greater specificity than that found in the instant case is clearly required in a mail fraud indictment even if the requirement is based solely upon the fact that mail fraud schemes are often very complex and the mere recitation of formulary language cannot suffice. Petitioner urges that the prior decisions of the Fifth Circuit have

required greater specificity in a mail fraud indictment and that the decision of the Fifth Circuit in this matter is contrary to those opinions. Petitioner urges that the rule to be adopted is that of the previous decisions of the Fifth Circuit which require extensive detailing of the alleged fraudulent scheme.

B. Insufficiency of Evidence.

One of the widely held principles in the mail fraud jurisprudence is that breach of a fiduciary obligation, a mere passive fraud, is not sufficient to constitute mail fraud. United States v. Goss, supra; United States v. Ballard, supra; United States v. Bohonus, supra; United States v. Barta, supra; and, United States v. McDonald, 576 F. 2d 1350 (9th Cir. 1978). The decision of the Fifth Circuit in the present case presents an important question for review because that

opinion allows a passive-type fraud to suffice for a mail fraud conviction and it represents a serious departure from the widely held and clearly established jurisprudence cited above.

The Fifth Circuit seems to rely upon its assertion that the testimony of Newton Gaspard's superiors that they knew and approved of his operation of South State Oil & Gas, Inc., and Ed's Tank Cleaning was "impugned by convincing evidence that Gaspard had paid or offered 'kickbacks' to a number of company supervisors." Opinion p. 5; 744 F. 438 , 440 . Again the Court has failed to see this in its whole context. Woodrow Wilson, a supervisor, approached Newton Gaspard and demanded a kickback and later returned the only check he received. Rec. Vol. II at p. 150. Travis Kieffer

stated that Newton Gaspard offered him a kickback once, but Kieffer never accepted. Rec. Vol. III at p. 273. As noted by the Fifth Circuit, Dayton King's office was in Lafayette, Louisiana, which is geographically near Intracoastal City but that is of no consequence because Mr. King was the second highest ranking man in the region, multi-state who had direct knowledge of and allowed Newton Gaspard to continue his businesses. Wilson's and Kieffer's reasons for not stopping the diesel and tank cleaning activities had nothing to do with the kickback, in fact their testimony was directly to the contrary, but were based upon Newton Gaspard's outstanding performance as an employee and the enormous profits generated by Newton Gaspard at the Intracoastal City facility. Although it is probable the NL Baroid hierarchy in

Houston and New Jersey had little or no knowledge of Newton Gaspard's involvement with South State Oil & Gas, Inc., and Ed's Tank Cleaning, it is without question that these superiors knew at all times what products and services Baroid was receiving and how much Baroid was paying for them. In fact, it is clear in the final analysis, that at the time Newton Gaspard was terminated, Baroid's concern was not with how much it was paying for diesel and tank cleaning, but to whom Baroid was paying the money. This is shown by the facts and Baroid's actions following the meeting held by Newton Gaspard, Tom Parker, and J.D. Love during the height of the oil shortage. See Rec. Vol. II at p. 134. Mr. Parker testified that Baroid was in a bind for diesel because of the shortage. Parker also testified that

Newton Gaspard stated that he could obtain diesel for Baroid. Parker, who at the time believed that Newton Gaspard intended to purchase the fuel from Newton Gaspard's son, told Newton Gsapard to go ahead as long as the price was competitive. Rec. Vol. II at p. 134. Obviously, the price remained competitive because Newton Gaspard continued business as South State Oil & Gas, Inc., in this manner for over five years. Another factor that the Fifth Circuit overlooked is that at this meeting, when Newton Gaspard said he could get diesel, he meant he could start his own company, later South State Oil & Gas, Inc., and sell diesel to Baroid. Mr. Parker's recollection that he though Newton Gaspard was going to buy the diesel from Newton Gaspard's son shows at least a partial understanding and knowledge by Parker of Newton Gaspard's personal

involvement with the sale of diesel to Baroid. Clearly Newton Gaspard acted in good faith in selling diesel to Baroid via South State Oil & Gas, Inc., and this was ignored by the Court. It is well established that good faith is a complete defense to a mail fraud prosecution. United States v. Goss, supra. There was no evidence presented at trial that Newton Gaspard ever tried to hide, conceal, or misrepresent his involvement with South State Oil & Gas, Inc., and Ed's Tank Cleaning. Additionally, there was no evidence, as in United States v. Hable, 613 F. 2d 1321 (5th Cir. 1980), of Newton Gaspard attempting to lull Baroid into a false sense of security or of Newton Gaspard attempting to postpone inquiries. He has always admitted and never tried to deny his involvement with South State Oil

& Gas, Inc., and Ed's Tank Cleaning. This Court's decision herein has drastically altered the jurisprudence surrounding mail fraud prosecutions concerning fiduciary relationships. As is widely held and well-established a breach of a fiduciary duty standing alone is only a passive fraud and does not constitute mail fraud. Some active fraud must be shown. The government must show some actions by the defendant intended to mislead the victim. That is the essence of fraud. United States v. Clark, 546 F. 2d 1130 (5th Cir. 1977). The Court now seems to be instilling an affirmative requirement for employees to make sure that everyone superior to them know of their activities in order to avoid a mail fraud prosecution. The jurisprudence, however, simply does not require that type of activism by a potential defendant. "The

laws protecting against fraud are most needed to protect the careless and the naive from lupine predators, and they are designed for that purpose." United States v. Kreimer, 609 F. 2d 126 (5th Cir. 1980), at p. 132. The decision of the original panel represents a clear departure from those standards and makes a passive fraud sufficient to sustain a mail fraud conviction. It must be noted that Newton Gaspard never intentionally failed to disclose his activities with South State Oil & Gas, Inc., and Ed's Tank Cleaning. He admitted it to everyone who inquired and, in fact, operated under the good faith belief that he has express permission to do so. Any failure to disclose was inadvertent at most and is insufficient to constitute mail fraud. It must be stressed, however, that the

decision of the original panel would now require anyone who does business with his employer to see to it that everyone from the mail room to the board room be aware of the transaction. But the jurisprudential requirements are simply not that stringent. Mail fraud is governed by a nontechnical standard and seeks to promote fundamental honesty and fair play. United States v. Kreimer, supra. In the present case, Newton Gaspard did business with his employer with the knowledge and approval of at least two levels of supervisors superior to him. Newton Gaspard had a good faith belief that every superior with Baroid who needed to know of his businesses knew. In addition, every superior who knew of Newton Gaspard's businesses allowed them to continue and approved of them until the intervention of the private investigator.

Baroid knew what price it was paying for the goods and services delivered to it and did nothing to alter the situation based upon the monetary considerations. The law does not impose a requirement upon Newton Gaspard to, in order to avoid a mail fraud prosecution, seek out all personnel in a superior position to inform them of what he intends to do. By not doing so, Newton Gaspard may have violated company policy and that may have justified his termination, but he did not violate the law and his convictions are not justified. If this now constitutes mail fraud, then the Fifth Circuit has set a whole new standard of proof for mail fraud and a whole new requirement for conviction.

Petitioner urges that this Court reject the new standard for conviction pronounced by the Fifth Circuit in this

case and adhere to the long accepted and firmly established requirement of an active fraud to constitute mail fraud.

C. Improper Prosecutorial Comment.

"A prosecutor's duty in closing arguments is to be scrupulous and to avoid all efforts to obtain a conviction by going beyond the evidence before the jury or by putting the sanction of his office behind the testimony of the witnesses." United States v. Dorr, 636 F. 2d 117 (5th Cir. 1981), at p. 120. In this case, where the evidence of fraud against the defendant was weak, certain remarks made by the prosecutor in closing and rebuttal argument were improper and denied Newton Gaspard of a fair trial.

First, the prosecutor remarked that the defendant "was better paid than most members of this jury or any other jury sitting in the State of Louisiana."

(Transcript of Arguments, p. 32). This is clearly an improper attempt by the prosecutor to appeal to the passion and personal prejudices of the jurors. See United States v. Smyth, 556 F. 2d 1179 (5th Cir. 1977).

Even more harmful and prejudicial than this last statement are two remarks made by the prosecutor regarding Defense Exhibit 1, which was a letter from NL Baroid signed by Travis Kieffer, one of Newton Gaspard's superiors, acknowledging that Newton Gaspard was selling diesel to NL Baroid as South State Oil & Gas, Inc. First, the prosecutor stated, "I submit to you that this is not a legitimate letter." (Transcript of Arguments, p. 35). Lastly, he remarked about the letter that "this is a paste up. This is a phony. It's a

fraud....Well, I think I was wrong because now there's a fourth scheme, a fourth fraud, and that is this bogus letter, the fourth scheme, but now there's a new victim. And who's the victim now? I submit to you, ladies and gentlemen, you are." (Transcript of Arguments, p. 60). Not only is this last remark improper and erroneous for commenting upon evidence outside the record, but is also an improper attempt to appeal to the passion and personal prejudices of the jurors. although Mr. Kieffer testified that he did not remember writing the letter and that he could not remember a reason for writing the letter, he did state without equivocation that the signature on the letter was his (Transcript of Proceedings, p. 271) and that the facts contained in the letter were true: he and many others with NL Baroid had knowledge of the fact

that Newton Gaspard was selling diesel to NL Baroid via South State Oil & Gas, Inc., (Transcript of Proceedings, p. 267). any comments tending to suggest that the letter was a fraudulent fabrication clearly exceeds the evidentiary bounds and are improper.

> To the extent an attorney's closing argument ranges beyond these boundaries it is improper. Except to the extent he bases any opinion on the evidence in this case, he may not express his personal opinion on the merits of the case or the credibility of witnesses. (Citations omitted). Furthermore, he may not suggest that evidence which has not presented at trial provides additional grounds for finding defendant guilty. United States V. Garza, 608 F. 2d 659 (5th Cir. 1979) at p. 663.

Of course, the prosecutor did just that by suggesting to the jury that the letter was a "paste up" and a "phony." He led the jury to believe that he has a personal

belief and opinion which must obviously have been based upon some evidence outside the record because no one at trial testified that, based upon their expertise, the letter was fraudulently constructed.

> It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of his evidence to be presented.
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> * * *
>
> A prosecutor's expression of personal belief may be tolerated if it is based solely upon the evidence introduced and the jury is not led to believe that other evidence unavailable to them, justified the belief. (Citations omitted). Hence, he may state, 'I believe that the evidence has shown the defendant's guilt,' but not, 'I believe that the defendant is guilty." United States v. Rodriguez, 585 F. 2d 1234 (5th Cir. 1978), at p. 1243-1244.

The prosecutor here said, in effect, "This

letter is fraudulent," which is absolutely improper and prejudicial. Since the prosecutor commented on these matters which were outside the record, reversible error per se has been committed and Newton Gaspard is entitled to have his convictions reversed. See United States v. Swinehart, 617 F. 2d 336 (3rd Cir. 1980). This is so even though no trial objection was made, as held by the Tenth Circuit in United States v. Rios, 611 F. 2d 1335 (10th Cir. 1979):

> The effect of these assertions before the jury was that defense counsel's investigator was clearly charged with contriving the defense testimony, with no factual basis to justify such a serious charge.
>
> * * *
>
> 'We hold and conclude that the prosecutor's comments constituted gross prosecutorial misconduct requiring reversal of

> defendant's conviction, even though no trial objection was lodged.' 611 F. 2d 1335, 1342.

The Fifth Circuit, in its decision, cited the case of United States v. McPhee, 731 F. 2d 1150 (5th Cir. 1984), in support of its position that these remarks, although bad, were not bad enough to require reversal. In McPhee, the Fifth Circuit reversed a conviction because of improper prosecutorial remarks that implied some special knowledge by the prosecutor. Here, the prosecutor did more than imply special knowledge; he stated without equivocation that the letter had been fraudulently conceived even though there was absolutely no evidence to that effect at trial and even though the author of the letter positively identified his signature and testified as to the truth of the letter's contents. McPhee clearly required reversal in this situation as to

the Fifth Circuit decisions in United States v. Dorr, 636 F. 2d 117 (5th Cir. 1981), United States v. Garza, 608 F. 2d 659 (5th Cir. 1979), and United States v. Rodriguez, 585 F. 2d 1234 (5th Cir. 1978).

Petitioner urges that these remarks were fatal to his right to a fair trial and that the Fifth Circuit has again ignored established jurisprudence. Petitioner urges this Court to redirect the jurisprudence and uphold petitioner's right to a fair trial.

D. Jury Instructions.

In perfunctorily dismissing defendant's alleged error concerning jury instructions, the Appellate Court has clearly failed to apply certain well-established principles of the Fifth Circuit.

> The primary purpose of jury instructions is to define with

> substantial particularity the factual issues , and clearly to instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them. (Citations omitted) . Accordingly, a defendant is entitled to a charge which precisely and specifically, rather than merely, generally or abstractly, points to the theory of his defense.
>
> * * *
>
> W e cannot depend on defense counsel's closing argument to save the Judge from error. United States v. Wolfson, 573 F. 2d 216 (5th Cir. 1978) at p. 221. Emphasis provided.

In reviewing the failure to give a defendant's proposed instruction regarding his theory of the case, the court must accept the testimony most favorable to the defendant, United States v. Lewis, 592 F. 2d 1282 (5th Cir. 1979).

> We must view this case under defendant's version of the facts, for 'defendant was entitled to have presented instruction relating to a

> theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, or of doubtful credibility.' United States v. Hammons, 566 F. 2d 1301 (5th Cir. 1978), at p. 1302.

See also United States v. Parker, 566 F. 2d 1304 (5th Cir. 1978).

Upon review of the facts of this case, it is clear that a mistake was made. Before the jury instructions were given, a charge conference was held at which the Trial Judge presented his proposed instructions. This proposed set contained no theory of defense charges at all. Upon review of Defendant's Requested Charges 14 and 15 (Record, p. 182 and 183), the Trial Judge added only the following:

> It is the defendant's contention regarding the activities of South State Oil & Gas, Inc., and Ed's Tank Cleaning that he did not conceal his relationship with these companies, that NL Baroid did not suffer by doing

> business with the two companies and that he operated both companies in good faith without intent to defraud. (Transcript of Instructions, p. 12).

This instruction barely related to the diesel and tank cleaning charges and made no mention at all of Newton Gaspard's theory regarding the concrete; i.e., that the paperwork chain was so deficient that the crime charged was not proved. Furthermore, the charge given makes no mention of the fact that NL Baroid routinely did business with its own employees, which was clearly shown by the government's own witnesses. Nor did the charge make note of the fact that tank cleaning was not part of a Baroid employee's regular duties and was customarily and routinely contracted out. The given charge also omits the fact that while the employees cleaning the tanks may

have been on the Baroid premises during their three days "on," they may not necessarily and probably were not on the Baroid time clock. These facts were well shown at trial by the governments own witnesses and, if believed by the jury, would surely have resulted in an acquittal. This is especially clear because the prosecution relied heavily on the argument that the tank cleaning was done by Baroid employees while on Baroid time. But, as indicated by Ralph Andrews, there is no way to prove that when the Baroid employees cleaned the tanks they were actually on Baroid time (Transcript of Proceedings, p. 207). "It has long been well established in this Circuit that it is reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally

sufficient to render the accused innocent." United States v. Lewis, supra at p. 1285. It is reversible error to refuse to sufficiently instruct as to the diesel and tank cleaning charges and it is reversible error to refuse to instruct at all as to the concrete counts.

By literally ignoring this assertion of error in its opinion in this case, the Fifth Circuit has again refused to recognize another serious impairment of defendant's right to a fair trial. Petitioner urges that this court reaffirm the jurisprudence ignored by the Fifth Circuit.

E. Other Prejudicial Errors and Their Cumulative Effect.

In addition to the errors discussed at length above regarding the improper prosecutorial remarks and the deficient jury instructions, defendant

alleged other errors on appeal, which independently deprived him of his right to a fair trial, but which have a much greater cumulative effect.

The first of these errors concerned the use of charts and summaries by the prosecution. During the course of the trial, the government introduced three charts into evidence and elicited summary testimony from three witnesses. The justification for the use of summary evidence is found in Federal Rules of Evidence, rule 1006, 28 U.S.C., which provides that "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation." Although this appears to be a rather blanket statement, the jurisprudence has set certain limits

regarding the use of charts and summaries. Summaries and charts are not to be considered evidence themselves. Charts and summaries may be used at trial providing the trial court gives a proper limiting instruction. See United States v. Smyth, 556 F. 2d 1179 (5th Cir. 1977); and, United States v. Scales, 594 F. 2d 558 (6th Cir. 1979). The Fifth Circuit in United states v. Smyth, supra, also indicated that the use of charts and summaries is a matter which should be resolved at a pre-trial level and that defense counsel should have an opportunity to not only examine the underlying documents but also to examine the charts and summaries. Of course, in this case, defense counsel was not given the opportunity to examine the charts and summaries and no cautionary instruction was given to the jury.

In addition, the trial court, over objection by defense counsel, allowed the testimony of Owen Odom, case agent from the F.B.I., whose sole testimony consisted of summarizing evidence that had been previously summarized and to introduce a chart containing those summaries. This is beyond the scope of Rule 1006, which provides for summary of "voluminous document," which had already been done. "A chart submitted by the prosecution is a very persuasive and powerful tool and must be fairly used, since, by its arrangement and use, it is an argument to the jury during the course of the trial." United States v. Conlin, 551 F. 2d 534 (2nd Cir. 1977), at p. 538-539. To have allowed this summary of summaries and the accompanying chart, all without prior examination by defense

counsel and without the proper limiting instruction, is clearly a plain error and substantially affected defendant's right to a fair and impartial trial. Not only did the trial judge fail to give a cautionary instruction regarding the charts and summaries, but his charge inferred that the charts were, themselves, evidence. The jury was charged that the "term evidence includes...the exhibits admitted in the record." (Transcript of Charges, p. 5). The jury was even allowed to view the charts during their deliberations.

The Fifth Circuit, in its opinion in this matter acnkowledges that a problem exists with the introduction of these charts and summaries, it holds that it does not constitute reversible error. Opinion, p. 8; 744 F. 2d 438, 442.

The next error, which was also ignored by the Fifth Circuit, concerns the admission into evidence of the testimony of Charles Guidry, a NL Baroid employee. The thrust of Mr. Guidry's testimony was that Newton Gaspard offered Mr. Guidry a bribe to falsify certain diesel fuel reports to those reports would not reflect a diesel deficiency. What the government seemed to be attempting to show is that Newton Gaspard was embezzling fuel that belonged to NL Baroid. But this testimony is totally unrelated to the indictment which only charges that Newton Gaspard sold diesel to NL Baroid and made a profit. By rejecting this error without discussion, the Fifth Circuit closed its eyes to not only the blatant inconsistencies in Mr. Guidry's testimony [i.e., the report that he was to falsify

was only "a little bit off," (Transcript of Proceedings, p. 180), and that his superiors (who were also Newton Gaspard's superiors) told him not to worry about the shortage (Transcript of Proceedings, p. 180), and that this whole set of circumstances occured in 1983, (Transcript of Proceedings, p. 180) after Newton Gaspard had been terminated in 1982] , but also to the fact that if the jury considered this evidence and convicted Newton Gaspard because of it, then Newton Gaspard may have been convicted of a crime with which he was not charged. A mail fraud defendant cannot be convicted of scheme Y if he was only charged with scheme X, "even if the schemes themselves overlap or are concentric." United States v. Mastelotto, 717 F. 2d 1238 (9th Cir. 1983), at p. 1248-1249; quoted with approval in United States v. Miller, 715

F. 2d 1360 (9th Cir. 1983), at p. 1362.

It is further evident that the Fifth Circuit ignored the cumulative effect of the errors alleged. Although they have acknowledged a problem with two of the specified errors, not sufficient individually, however, to require reversal, the Fifth Circuit declined to consider the established jurisprudence of that circuit which holds that even though individual errors may not independently require reversal, the cumulative effect of those errors will require reversal. United States v. Labarbera,581 F. 2d 107 (5th Cir. 1978). Four serious errors were alleged to have been committed at the trial level: improper prosecutorial remarks, deficient jury instructions, erroneous introduction and use of summaries and charts, and the erroneous

admission of testimony. These errors are so clearly prejudicial that defendant was seemingly without hope of obtaining a fair trial.

Petitioner urges that the opinion of the Fifth Circuit in this matter is clearly contrary to and non-responsive to the case law regarding these particular prejudicial errors and their cumulative effect. Petitioner urges that this Court should adopt the more reasoned principle of protection of a defendant's Constitutionally mandated right to a new trial and hold that these errors and their cumulative effect require reversal of the convictions.

F. Restitution.

Although the defendant was not required to pay restitution pursuant to Title 18 U.S.C. 3579, its application to this trial presents an important question

for review by the Supreme court. This is another issue upon which the Fifth Circuit declined to comment.

Title 18 U.S.C. 3579, inter alia, provides that a "court, when sentencing a defendant convicted of an offense under this title...may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim the offense." It is clear, not only from the plea discussions held with Assistant U.S. Attorney and the F.B.I. agents, but also from the government's thrust of proof at trial that one of the government's main interests was to obtain an award of restitution for NL Baroid pursuant to 18 U.S.C. 3579. In the plea discussions it was literally and expressly said as such. At trial it is

shown first by the government's motion in limine filed January 20, 1984, which motion was granted by the trial court. The motion sought to allow the government to introduce as evidence an enormous amount of invoices and other documents not specifically enumerated in the indictment. What was introduced pursuant to this motion were all the invoices of diesel wholesalers to South State Oil & Gas, Inc., and all the invoices from South State Oil & Gas, Inc., to NL Baroid within the indictment's time frame. Contrary to the assertions of the government, this paperwork was absolutely unnecessary and superfluous in their attempt to prove a scheme to defraud. A scheme to defraud, if there had been one, could have been proven by first showing that Newton Gaspard was operating the two businesses and that he was selling goods and services

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to his employer. This could have easily been shown by the ten checks from NL Baroid which attempt to make up Counts I through X of the indictment. Each check was issued pursuant to the generation of several Baroid purchase orders which, in turn, were generated from respective South State Oil & Gas, Inc., and Ed's Tank Cleaning invoices. These documents alone were more than sufficient to establish a business relationship between South State Oil & Gas, Inc., and NL Baroid and between Ed's Tank Cleaning and NL Baroid. The rest of the documents, introduced through the various summary witnesses, have as their sole purpose an attempt to show an amount of money which NL Baroid should be compensated. There was even a specific chart to show that exact amount, Government Exhibit 28. These documents

have absolutely no relation to showing the next requirement for mail fraud, i.e., active, deliberate, and fraudulent concealment or misrepresentation. The government and the court were mixing the criminal trial with the civil aspect of 18 U.S.C. 3579. This is highly improper and prejudicial especially in view of the fact that not only is there a statutory provision for the separate determination of restitution, i.e., 18 U.S.C. 3580, but there is an administrative avenue alrady functioning in the for of the United States Probation Office, which handles the pre-sentence investigation. In this case, the probation officer actually did her own investigation regarding possible restitution. The intertwining the criminal with the civil can only serve to confuse the jury as to their proper role. In this case, the jury's function was to

decide whether the defendant had deliberately and fraudulently concealed or misrepresented any material fact from his employer. That decisional process was not helped, but was, in fact, hindered and confused by the substantial government testimony and evidence on the pure numbers.

To further highlight the extreme impropriety of the application to this statute to these proceedings is the fact that the restitution statute, 18 U.S.C. 3579, is not applicable to these charges at all. Section 9 (b)(2) of Public Law 97-291 provides that the "amendments made by section 5 of this Act [which enacts 18 U.S.C. 3579 and 3580] shall apply with respect to offenses occurring on or after January 1, 1983." As can be clearly seen from the indictment, the offenses charged

were all alleged to have occurred in 1981 and 1982, so restitution is an inappropriate remedy for this situation and to have allowed its application to this case absolutely deprived Newton Gaspard to his right under the Sixth Amendment to a fair trial.

The noteworthy decision by Judge Acker in United States v. Welden, 568 F. Supp 516 (N.D. Ala. 1983), further emphasized the defective nature of 18 U.S.C. 3579 and, in fact, declared the statute to be unconstitutional even when presented in the format of having a separate trial to determine guilt and then another trial to determine the amount of restitution. It is submitted, therefore, that to have allowed application of 18 U.S.C. 3579 to the proceedings in this case was plain error and unconsitutionally deprived Newton Gaspard of his right to a

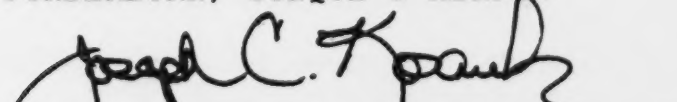
fair trial. In having declined to address this issue, the Fifth Circuit has again ignored a substantial question and petitioner urges this Court to consider the application of the restitution statute of these proceedings.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court issue the Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit and that, upon doing so, the Court reverse the convictions of the defendant.

RESPECTFULLY SUBMITTED:

FUNDERBURK, CONQUE & HERPIN



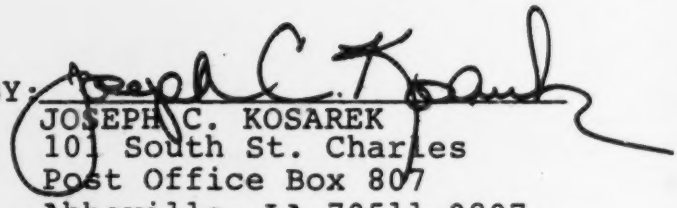
BY:/s/ JOSEPH C. KOSAREK
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Phone: (318) 893-8140
Attorneys for Petitioner

CERTIFICATE

I hereby certify that a copy of the above and foregoing has this day been forwarded to the Solicitor General, by depositing same in the United States Mail, postage prepaid, and properly addressed.

Abbeville, Louisiana, this 11th day of December, 1984.

FUNDERBURK, CONQUE & HERPIN

BY: 

JOSEPH C. KOSAREK
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Abbeville, LA 70511-0807
Attorneys for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA

VERSUS

CRIMINAL NO: CR83-60059

NEWTON GASPARD;
JAMES A. GASPARD
SOUTH STATE OIL & GAS, INC., J.P. RENTALS, INC.

18 U.S.C. §371; §1341; § 2

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT I

1) AT ALL TIME MATERIAL HEREIN:

a. NEWTON GASPARD was an employee of N.L. Baroid, a Division of N.L. Industries, Incorporated, at Intracoastal City, Louisiana.

b. NEWTON GASPARD was a District Operating Supervisor for N.L. Baroid.

c. NEWTON GASPARD'S

responsibilities were, among others, directing the ordering, purchasing, and receiving of materials to N.L. Baroid from outside vendors and to insure the distribution of N.L. Baroid products to its customers.

d. NEWTON GASPARD was the President of SOUTH STATE OIL AND GAS, INCORPORATED hereinafter referred to as SSOG, INC. and a 51% shareholder in that corporation.

e. NEWTON GASPARD, in his capacity as a District Operating Supervisor, had authority to approve invoices to N.L. Baroid for materials in any amount, if the material is a required inventory purchase.

f. NEWTON GASPARD, in his capacity as District Operating Supervisor, had authority to approve invoices to N.L. Baroid up to $2,000 for such non-required

purchases as maintenance and repair.

g. NEWTON GASPARD, as an employee of N.L. Baroid, signed a statement of understanding that he would not engage in any conflicts of interest with his employer.

2) AT ALL TIMES MATERIAL HEREIN:

a. N.L. Baroid, a subsidiary of N.L. Industries, is a major manufacturer and distributor of drilling mud, with offices at Intracoastal City, Louisiana.

b. N.L. Baroid is in the business of producing drilling mud for drilling well sites throughout the Louisiana Gulf Coast area.

c. In producing the drilling mud, N.L. Baroid purchases enormous amounts of diesl fuel.

d. It is the written policy of N.L. Industries, Incorporated that no

employees shall be engaged in a conflict of interest.

3) Beginning on or about January 20, 1981, and continuing until October, 1982, in the Western District of Louisiana and elsewhere, NEWTON GASPARD, the defendant herein, having devised and intending to devise a scheme and artifice to defraud and to obtain money under false and fraudulent pretenses and to deprive his employer, N.L. Baroid, of:

a. N.L. Baroid's right to the honest, loyal, and faithful service of its employee, NEWTON GASPARD.

b. N.L. Baroid's right to have its employee perform his duties free from dishonesty, fraud, and motivation for personal profit; which scheme and artifice was in substance as follows:

4) It was part of the scheme and artifice to defraud that:

a. NEWTON GASPARD incorporated SOUTH STATE OIL AND GAS, INC., on April 17, 1980.

b. NEWTON GASPARD would order hundreds of thousand of gallons of diesel fuel and resell it to his employer, N.L. Baroid.

c. NEWTON GASPARD utilized the tanks, fuel lines, and other equipment of his employer, N.L. Baroid, to operate his personal business, SSOG, INC.

d. NEWTON GASPARD resold diesel fuel to his employer, N.L. Baroid, at a profit.

e. NEWTON GASPARD, a supervisor at N.L. Baroid would order his subordinated to receive and distribute SSOG, INC., diesel fuel while these subordinates were working for N.L. Baroid.

f. NEWTON GASPARD used his

N.L. Baroid office as his SSOG, INC., office and further utilized the N.L. Baroid telephone number on his SSOG, INC., invoices.

g. NEWTON GASPARD submitted invoices to N.L. Baroid billing Baroid for purchases of diesel fuel.

h. The SSOG, INC., invoices generated and caused to be mailed numerous checks from N.L. Industries, Hightstown, New Jersey, to SSOG, INC., Post Office Box 905, Abbeville, Louisiana.

5. On or about January 20, 1981, in the Western District of Louisiana, NEWTON GASPARD and SOUTH STATE OIL AND GAS, INC., defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused N.L. Industries to place in an authorized depository for mail matter to be sent and delivered by the

United States Postal Service, that is, an envelope to SSOG, INC., Abbeville, Louisiana, containing an N.L. Industries check number 07413590, in the amount of $79,902.58, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. § 1341]

COUNT II

1) The Grand Jury realleges and incorporates by reference all of the allegations of paragraphs one though four of Count I of this indictment as a scheme and artifice to defraud.

2) On or about August 24, 1981, in the Western District of Louisiana, NEWTON GASPARD and SOUTH STATE OIL AND GAS, INC., the defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused N.L. Industries to

place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope to SSOG, INC. FROM N.L. Industries, containing a check numbered 01382461 in the amount of $47, 363.40, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. § 1341]

COUNT III

1) The Grand Jury realleges and incorporates by reference all of the allegations of paragraphs one through four of Count I of this indictment as a scheme and artifice to defraud.

2) On or about December 17, 1981, in the Western District of Louisiana, NEWTON GASPARD and SOUTH STATE OIL AND GAS, INC., the defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused N.L. Industries to

place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope to SSOG, INC., from N.L. Industries, containing a check numbered 07665966 in the amount of $79,535.80, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. §1341]

COUNT IV

1) The Grand Jury realleges and incorporates by reference all of the allegations of paragraphs one through four of Count I of this indictment as a scheme and artifice to defraud.

2) On or about April 26, 1982, in the Western District of Louisiana, NEWTON GASPARD and SOUTH STATE OIL AND GAS, INC., the defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do

so, knowingly caused N.L. INdustries to place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope to SSOG, INC., from N.L. Industries, containing a check numbered 08108054 in the amount of $63,575.72, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. §1341]

COUNT V

1) The Grand Jury realleges and incorporates by reference all of the allegations of paragraphs one though four of Count I of this indictment as a scheme and artifice to defraud.

2) On or about July 9, 1982, in the Western District of Louisiana, NEWTON GASPARD and SOUTH STATE OIL AND GAS, INC., the defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do

so, knowingly caused N.L. Industries to place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope to SSOG, INC., from N.L. Industries, containing a check numbered 08221098 in the amount of $49,612.50, in violation of Title 18, United States code, Section 1341. [18 U.S.C. §1341]

COUNT VI

1) The Grand Jury realleges and incorporates by reference paragraphs one and two of Count I of this Indictment.

2) Beginning on or about July 9, 1981, and continuing until on or about July 15, 1982, in the Western District of Louisiana and elsewhere, NEWTON GASPARD, the defendant herein, devised a scheme and artifice to defraud and to obtain goods under false and fraudulent pretenses and

to deprive his employer, N.L. Baroid of:

a. Its right to the honest, loyal, and faithful service of its employee, NEWTON GASPARD.

b. N.L. Baroid's right to have its employee perform his duties free from dishonesty, fraud, and motivation for personal profit.

c. The services of certain N.L. Baroid employees who were being supervised by NEWTON GASPARD.

3) It was part of the scheme and artifice to defraud that:

a. NEWTON GASPARD formed Ed's Tank Cleaning and Cajun Tank Cleaning Service.

b. Ed's Tank Cleaning and Cajun Tank Cleaning Service were involved with cleaning drilling mud tanks at N.L. Baroid.

c. Ed's Tank Cleaning and Cajun

Tank Cleaning Service had no full-time employees but hired certain N.L. Baroid employees on a part-time basis.

d. These N.L. Baroid employees were solicited by their supervisor, NEWTON GASPARD, to work on the tanks.

e. NEWTON GASPARD paid these employees in cash to clean the tanks.

f. Many of these employees were on duty and were being paid by N.L. Baroid while at the same time being paid by NEWTON GASPARD for cleaning drilling mud tanks.

g. NEWTON GASPARD submitted numerous invoices to N.L. Baroid from Ed's Tank Cleaning and Cajun Tank Cleaning Service for tanks that were being cleaned by N.L. Baroid personnel on N.L. Baroid time.

h. NEWTON GASPARD, as a

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supervisor at N.L. Baroid, solicited his subordinates to work for NEWTON GASPARD'S private business interests while knowing full well that that said employees were also being paid for their services by their employer, N.L. Baroid.

i. The invoices submitted to N.L. Baroid by NEWTON GASPARD generated numerous checks being mailed from N.L. Industries' office in Hightstown, New Jersey.

4. On or about August 10, 1981, NEWTON GASPARD, the defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused N.L. Industries to place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope containing check number 04476258 in the amount

$5,920.00, which was addressed to Ed's Tank Cleaning, 216 E. Trails End, Abbeville, Louisiana, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. §1341] .

COUNT VII

1. The Grand Jury realleges and incorporates by reference paragraphs one and two of Count I and paragraphs two and three of Count VI of the Indictment herein:

2. On or about September 14, 1981, NEWTON GASPARD, the defendant herein, for the purpose of executing the aforesaid scheme and attempting to do so, knowingly caused N.L. INdustries to place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope containing check number 07594166 in the

amount of $7,905.00, which was addressed to Ed's Tank Cleaning, 216 E. Trails End, Abbeville, Louisiana, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. §1341]

COUNT VIII

1. The Grand Jury realleges and incorporates by reference paragraphs one and two of Count I and paragraphs two and three of Count VI of the Indictment herein:

2. On or about September 18, 1981, NEWTON GASPARD, the defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused N.L. Industries to place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope containing check number 07602665 in the amount of

$7,840.00, which was addressed to Ed's Tank Cleaning, 216 E. Trails End, Abbeville, Louisiana, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. §1341]

COUNT IX

1. The Grand Jury realleges and incorporates by reference paragraphs one and two of Count I and paragraphs two and three of Count VI of the indictment herein:

2. On or about April 26, 1982, NEWTON GASPARD, the defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused N.L. Industries to place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope containing

check number 08108053 in the amount of $11,725.00, which was addressed to Ed's Tank Cleaning, 216 E. Trails End, Abbeville, Louisiana, in violation of title 18, United States Code, Section 1341. [18 U.S.C. § 1341]

COUNT X

1. The Grand Jury realleges and incorporates by reference paragraphs one and two of Count I and paragraphs two and three of Count VI of the Indictment herein:

2. On or about July 15, 1982, NEWTON GASPARD, the defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused N.L. Industries to place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope containing check number 08228564

in the amount of $13,500.00, which was addressed to Ed's Tank Cleaning, 216 E. Trails End, Abbeville, Louisiana, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. §1341]

COUNT XV

1) The Grand Jury realleges and incorporates by reference to paragraphs one and two of Count I of the indictment herein.

2) From some time in April 1982 and continuing into September, 1982, in the Western District of Louisiana and elsewhere, NEWTON GASPARD, the defendant herein, having devised and intending to devise a scheme and artifice to defraud and to obtain property under false and fraudulent pretenses and to deprive his employer, N.L. Baroid, of:

a. Its right to the honest,

loyal, and faithful service of its employee, NEWTON GASPARD.

b. N.L. Baroid's right to have its employee perform his duties free from dishonesty, fraud, and motivation for personal profit; which scheme and artifice was in substance as follows:

3) It was part of the scheme and aritfice to defraud that:

a. NEWTON GASPARD ordered loads of concrete from Roy E. Young.

b. NEWTON GASPARD ordered concrete to be delivered to the new home of his son-in-law, Joseph Kosarek; said deliveries occurring on or about April 29, 1982, and May 21, 1982.

c. NEWTON GASPARD ordered concrete to be delivered to the new home of his son, James Gaspard; said deliveries occurring on or about July 19, 1982, and August 20, 1982.

d. NEWTON GASPARD approved the concrete invoices as having been received and purchased by his employer, N.L. Baroid, while knowing full well that the concrete in question was not for any business-related purpose.

e. Roy E. Young, the concrete vendor, was paid by N.L. Baroid for concrete delivered to NEWTON GASPARD'S relatives.

f. On or about November 5, 1982, after an investigation was initiated, NEWTON GASPARD paid Roy E. Young $4,872.14 in cash, representing a reimbursement of the value of the concrete at Joseph Kosarek's house.

4) On or about August 12, 1982, NEWTON GASPARD, the defendant herein, for the purpose of executing the aforesaid scheme and aritifce to defraud and

attempting to do so, knowingly caused N.L. Industries to place in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope to Roy E. Young, Abbeville, Louisiana, containing N.L. Industries check number 08264159, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. §1341].

COUNT XVI

1) The Grand Jury realleges and incorporates by reference paragraphs one and two of Count I and paragraphs two and three of Count XV of the indictment herein.

2) On or about August 23, 1982, NEWTON GASPARD, the defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused N.L. Industries to place in an authorized

depository for mail matter to be sent and delivered by the United States Postal Service, that is, an envelope to Roy E. Young, Abbeville, Louisiana, containing N.L. Industries check number 08275736, in violation of Title 18, United States Code, Section 1341. [18 U.S.C. §1341] .

A TRUE BILL:

WILLIE PROVOST
FOREMAN: FEDERAL GRAND JURY

JOSEPH S. CAGE, JR.
United States Attorney

BY: JAMES T. MCMANUS
Assistant United States Attorney

JURY INSTRUCTIONS

THE COURT: Now that you have heard the closing arguments, I might have one comment on the arguments for the jury.

It is proper for counsel, in

summation, to make arguments relating to the credibility of the witnesses and the weight of the evidence where such comments are based on his observation of the witnesses and the weight of the evidence where such comments are based on his obversation of the witnesses and the inferences and conlusions that may be deduced from the evidence. On the other hand, it is improper for him to inject his own personal beliefs and knowledge and that belief of this clients. So, in any situation, in regard to what the government may have in the government's mind, that means nothing.

Members of the jury, you have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties. It becomes my duty, therefore, to instruct you on the rules of

law that you must follow and apply in arriving at your decision in the case.

In any jury trial, there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

You, as jurors, are the judges of the facts, but in determining what actually happened in this case, that is in reaching your decision as to the facts, it is your sworn duty to follow the law I am now in the process of defining for you, and you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction or to question the wisdom or

correctness of any rule I may state to you, that is you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you regardless of the consequences.

By the same token, it is also your duty to base your verdict solely upon the testimony and evidence in the case without prejudice or sympathy. That was a promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The indictment or formal charge against a defendant is not evidence of guilt. Indeed the defendant is presumed by law to be innocent. The law does not require a defendant to prove his innocence or to produce any evidence at all, and no

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inference whatever may be drawn from the election of a defendant not to testify. The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so, you must acquit him.

Thus while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond a possible doubt. It is only required that the government's proof exclude any reasonable doubt concerning the defendant's guilt. A reasonable doubt is a real doubt based upon reason and common sense after careful and impartial consideration of all of the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so; if you are not convinced, say so.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term evidence included the sworn testimony of the witnesses and the exhibits admitted in the record. Neither the indictment nor statements of the attorneys are evidence in the case. Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing call your attention to certain facts or inferences

that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in this case. What the lawyers say is not binding upon you.

So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case. You may also consider either direct or circumstantial evidence.

Direct evidence is the testimony of the one who asserts actual knowledge of a fact such as an eyewitness. circumstantial evidence is proof of a

chain of facts and circumstances indicating either the guilt or innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he can be convicted.

Now, I had said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness and the weight to be given to his testimony.

In weighing the testimony of a witness, you should consider his relationship to the government or the defendant, his interest if any in the

outcome of the case, his manner of testifying, his opportunity to observe or acquire knowledge concerning the facts about which he testified, his candor, fairness and intelligence, and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also the weight of the evidece is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by contradictory evidence by

showing that he testified falsely concerning a material matter or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with the witness' present testimony. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

For your review, Newton Gaspard has been charged with twelve counts of mail fraud. Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense. The indictment charged Newton Gaspard in counts one through count five of mail fraud regarding checks mailed from NL

Industries' office in Hightstown, New Jersey and delivered by the United States postal service to South State Oil and Gas, Incorporated.

Counts six through ten is mail fraud regarding checks mailed from NL Industries in Hightstown, New Jersey and delivered by the United States postal service to Ed's Tank Cleaning, and in count fifteen and sixteen of mail fraud regarding checks mailed from NL Industries' office in Hightstown, New Jersey to Roy Young, a concrete vendor, in payment of concrete delivered to the home of Newton Gaspard's son and son-in-law.

All counts charge the defendant with violation of Title 18, United States Code, Section 13:41. In order to establish that the defendant is guilty of mail fraud, the government must prove beyond a reasonable doubt that, one, the defendant willfully

and knowingly devised a scheme or artifice to defraud or for obtaining money or property by means of false pretenses, representations or premises; and, two, the defendant used the United States postal service by mailing or by causing to be mailed some matter or thing for the purpose of executing the scheme to defraud.

The words scheme and artifice include any plan or course of action intended to deceive others and to obtain by false or fraudulent pretenses representations or promises money or property from persons so deceived. A statement or a representation is false or fraudulent within the meaning of this statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity and is made or caused

to be made with the intent to defraud. A statement or representation may also be false or fraudulent when it constitutes a half-truth or effectively concealed a material fact with intent to defraud. The material fact is a fact that would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction.

To act with intent to defraud means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self. In order to prove violations of the mail fraud statute, it must be proved beyond a reasonable doubt that Newton Gsapard had specific intent to defraud.

The government proves specific intent under the mail fraud statute if it proves

that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension. This intent is shown by examining the scheme itself. It is not necessary that the government prove all the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the material mail was itself false or fraudulent or that the use of the mail was intended as a specific or exclusive means of accomplishing the alleged fraud. What must be proved beyond a reasonable doubt is that the accused knowingly and willfully devised or intended to devise a scheme to defraud, substantially the same as the one alleged in the indictment and that the use of the U.S. mail was closely related to the scheme in that the accused either mailed something or caused it to be mailed in an

attempt to execute or carry out the scheme.

To cause the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen.

Further, if you find beyond a reasonable doubt that the defendant, Newton Gaspard was employed by NL Baroid, a division of NL Industries, for the purpose of, among other things, purchasing products and services for and approving invoices to NL Baroid, then you are instructed that the defendant stood in a fiduciary relationship to NL Baroid. Such a fiduciary relationship would require that Newton Gaspard exercise utmost good faith in his relationships with NL Baroid and make full disclosure to NL Baroid of any hidden interest he might have in the

purchases he was approving.

If you find beyond a reasonable doubt that Newton Gaspard knowingly used that fiduciary position to obtain or attempt to obtain secret profits for his own personal use and benefit at the expense of NL Baroid, then that would be a breach of a fiduciary duty, however breach of a fiduciary duty standing alone is insufficient to establish mail fraud violations.

In order to establish a mail fraud violation here, there must also be proof of, one, a recognizable scheme formed with specific intent to defraud; two, the use of the mails in execution of the scheme; and, three, some detriment to the employer.

The detriment to NL Baroid alleged here is, one, an acutal financial loss;

and, two, the deprivation of Newton Gaspard's faithful and honest service in that he failed to fulfill his duty to disclose material information to NL Industries and or NL Baroid.

Information is material whenever an employee has reason to believe the information would lead a reasonable employer to change its business conduct. Thus, in order to find that Newton Gaspard's breach of fiduciary duty constitutes an illegal fraud under 18 U.S.C. Section 13:41 you must also find beyond a reasonable doubt that his acts resulted in a financial loss to NL Baroid and/or that he breached a duty to disclose information which he believed would have led NL Baroid to change its business conduct.

It is the defendant's contention regarding the activities of South State

Oil and Gas and Ed's Tank Cleaning that he did not conceal his relationship with these companies, that NL Baroid did not suffer by doing business with the two companies and that he operated both companies in good faith without intent to defraud. You are instructed that good faith is a complete defense to a charge of intent to defraud under the mail fraud statute involved here. If the evidence in this case leaves you with a reasonable doubt whether Newton Gaspard acted in good faith at the time of the alleged mailings, then you should acquit the defendant.

Where a defendant has offered evidence of good general reputation of truth and veracity or honesty and integrity or as a law-abiding citizen, the jury should consider such evidence along with all other such evidence in the case.

Evidence of a defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt since the jury may think it improbable that a person of good character in repsect to those traits would commit such a crime.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence. You will note that the indictment charges that the offense was committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a day reasonable near the date alleged.

The word knowingly as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally and not because of mistake or intent. The word willfully as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids, that is to say with bad purpose either to disobey or disregard the law.

I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant from the evidence in this case. The defendant is not on trial for any conduct or offense not alleged in the indictment.

Evidence that an act was done at one time or on one occasion is not evidence of

proof whatever that a similar act was done at another time or on another occasion. That is to say evidence that the defendant may have committed an act similar to the act alleged in the indictment may not be considered by the jury in determining whether the defendant in fact committed any act charged in the indictment. Nor may evidence of some other act of a like nature be considered for any other purpose whatever unless the jury first finds that the other evidence in the case standing alone establishes beyond reasonable doubt that the defendant did the particular act charged in the particular count of this indictment then under deliberation.

If the jury should find beyond a reasonable doubt from other evidence in the case that the defendant did the act charged in the particular count under deliberation, then the jury may consider

evidence as to an alleged act of a like nature in determining the state of mind or scheme in furtherance of which the defendant did the act charged in the particular count. And where proof of an alleged act of a like nature is established by evidence which is clear and conclusive, the jury may but is not obligated to draw the inference and find that in doing the act charged in the particular count under deliberation the defendant acted knowingly and intentionally.

Also the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court or judge and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accuse.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

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Remember at all times you are not partisans, you are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon returning to the jury room, you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in Court.

A formal verdict has been prepared for your convenience and it really requires little explanation. It simply states, "We the jury find the defendant, Newton Gaspard", and there is a list of the counts involved in this case and there are blanks. You will either fill in the blank guilty or not guilty on each verdict, and you will take the verdict form to the jury room, and when you have reached a unanimous agreement, you will

have the foreman fill it in, date it and sign it and then return to the courtroom.

If during the course of your deliberations you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, you should never state or specify your numerical division at the time.

Now, I'm going to send along with the verdict to the jury room two copies of the indictment. As you know, I have read the indictment once. I will not read it again at this time except I want to remind you

again that the indictment is not evidence against the accused and affords no inference of guilt.

Do the attorneys need to approach the bench for anything?

MR. McMANUS: No, Your Honor.

MR. THEALL: No, Your Honor.

THE COURT: Juror number fifty-one, Mr. Beverly?

MR. BEVERLY: Yes, sir?

THE COURT: Mr. Beverly, you are the alternate juror, and therefore none of the other jurors have had to be excused during the course of the trial, so you will not deliberate with the twelve-man jury. We will be happy to have you remain here with us. You can stick around or you will be free to go, so you will not go to deliberate.

Mr. Marshal, would you please escort the jury out?

I might say this. I am not sending any of the exhibits at this time with you to the jury room. If you all need any exhibits that you need to review, please send a request to me or to the marshal.

(Whereupon the jury was retired from the courtroom to begin their deliberations at 11:10 a.m.)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA CRIMINAL NO: CR 83-60059

VERSUS

NEWTON GASPARD, et al. 18 U.S.C. §371; §1341; §2

* * * * * * * * * * *

DEFENDANTS' REQUESTED CHARGE NO. 14

DEFENDANTS' THEORY OF THE CASE-DIESEL

The defendants contend with respect to the diesel charges that the supervisors of Newton Gaspard within NL Baroid were

well aware of his connection with South State Oil & Gas, Inc., and accepted it for more than three years. Newton Gaspard contends that he sought and obtained the approval of his supervisors to sell diesl to NL Baroid at competitive prices. Defendants further contend that it was to the benefit of NL Baroid to do business with South State Oil & Gas, Inc., in that Baroid was assured of a source of supply even during fuel shortages, and was a preferred customer of any other local supplier. Defendants further contend that NL Baroid did not lose any money as a result of doing business with South State Oil & Gas, Inc., but actually spent less than it would have otherwise. Defendants contend that they dealt with NL Baroid openly and above board and in good faith, and did not conceal the relationship between Newton Gaspard and South State Oil

& Gas. They further contend that NL Baroid as a routine practice knowingly and regularly did business with its own employees or their families.

Authority: Recommendations of Devitt and Blackmar, Federal Jury Practice and Instructions, 3d ed. 1977, in 1983 pocket part of pp. 627 and 629; U.S. V. Goss, 650 F. 2d 1336, at 1344 (5th cir. 1981).

THEALL & FONTANA
BY:/s/ GARY E. THEALL
ATTORNEY FOR DEFENDANTS

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA CRIMINAL NO: CR 83-60059

VERSUS

NEWTON GASPARD, et al. 18 U.S.C. §371; §1341; §2

* * * * * * * * * * *

DEFENDANTS' REQUESTED CHARGE NO. 15

DEFENDANTS' THEORY OF THE CASE-TANK CLEANING

Defendant, Newton Gaspard, contends with respect to the tank cleaning charges that in his capacity as supervisor of the Intracoastal City Office of NL Baroid, he solved a problem to the mutual benefit of all concerned by establishing a tank cleaning business. He contends that tank cleaning was not a part of the duties of the Nl Baroid employees but was normally contracted out. He contends that the problem arose when outside tank cleaning

services became so expensive that NL Baroid customers, to whom this cost was passed on, began to complain and in some instances refused to pay, causing NL Baroid to suffer a loss. He contends that NL Baroid employees at Intracoastal City were paid for 16 hours and were on the premises 24 hours per day for three days at a time, and there were many occasions when there was not enough NL Baroid work within their job classifications to fill 16 hours. He conceived the idea of allowing these NL Baroid employees to replace the tank cleaning crews in their spare time, provided it did not interfere with their assigned NL Baroid duties. He contends that he acted in good faith, and that his action resulted in lower cost to NL Baroid, more satisfied customers, extra pay for NL Baroid employees, and at no time interferred with their NL Baroid

duties.

Authority: Recommendations of Devitt and Blackmar, Federal Jury Practice and Instructions, 3d ed. 1977, in 1983 pocket part of pp. 627 and 629; U.S. v. Goss, 650 F. 2d 1336, at 1344 (5th Cir. 1981).

THEALL & FONTANA
BY:/s/GARY E. THEALL
ATTORNEY FOR
DEFENDANTS

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA

VERSUS — CRIMINAL ACTION NO: 83-60059-01

NEWTON GASPARD — SECTION O

MEMORANDUM RULING ON MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, FOR A NEW TRIAL

The defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict, or

in the Alternative, for a New Trial was submitted to the Court on the briefs of counsel and without the necessity of oral argurment.

The defendant's motion is based on the ground that the verdict lacks substantial evidence to convict defendant of fraud in connection with his sale of diesel to his employer, N.L. Baroid, his operation of a tank cleaning business on the premises of N.L. Baroid with the use of N.L. Baroid employees and equipment, and that the record does not contain substantial evidence that N.L. Baroid paid for the concrete that the defendant procured from Young for his personal use at residences of members of his family. Finally, defendant contends he is entitled to a new trial due to improper remarks made by the prosecutor in closing argument in characterizing the

defendant as some sort of kingpin whose powers extended over South Louisiana and one with whom his superios were afraid to deal, and that a letter introduced into evidence by the defendant was a forgery.

In regard to the counts involving the diesel sales, the record is clear that defendant made a profit on each gallon sold to his employer. The record is also clear to the effect that on most occasions when Baroid employees were working for defendant in his tank cleaning business they were being paid by N. L. Baroid to do work for N. L. Baroid. It is also clear that there was substantial evidence for the jury to conclude that N. L. Baroid paid for the concrete delivered to the two homes as is evicenced by the checks introduced in evidence.

In Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942),

the Court stated that it was not for the justices "...to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." Supra, p. 80. In the present situation, there were facts before the jury as to each and every element of the crime charged . This Court's inquiry here is limited to considering whether evidence was admitted sufficient to ground a belief by the jury that beyond a reasonable doubt, the defendant in this case was guilty of the crime charged. United States v. Burnette, 524 F.2d 29 (5th Cir. 1975). The Court finds that from the evidence and facts presented, the jury could have reasonably determined guilt.

The Court does not find that counsel

for the government made any improper remarks in arguing his case. Much latitude is permitted counsel in arguing his case. Counsel may state his views of the evidence and various inferences and conclusions which he believes the jury should draw from the testimony. In regard to the copy of the letter offered in evidence, the alleged author testified that he recognized his signature but did not believe he ever wrote such a letter to the defendant. The Court cannot say that the prosecutor's suggestion to the jury that the letter was a forgery constitutes plain error. Likewise, counsel's reference to the fact that defendant was a kingpin and his superiors were afraid of him is not in the Court's opinion an improper remark and certainly not reprehensible or prejudicial to the defendant.

Thus, the defendant's Motion for

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Judgment of Acquittal Notwithstanding the Verdict or in the Alternative for a New Trial, is DENIED.

Opelousas, Louisiana, March 23, 1984.

/s/JOHN M. SHAW
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 84-4233

UNITED STATES of America,
Plaintiff-Appellee,

V.

Newton GASPARD,
Defendant-Appellant.

Appeal for the United States District Court for the Western District of Louisiana

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Decided and Filed October 9, 1984.

Before GARZA, REAVLEY and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Defendant Newton Gaspard was convicted on twelve counts of mail fraud for violations of 18 U.S.C. § 1341. He received twelve concurrent sentences of a year and a day and was fined a total of

$12,000.00. Gaspard alleges nine points of error. We reject his contentions and affirm the convictions.

I. Background

The twelve counts arise out of Gaspard's employment at NL Baroid ("Baroid"), a major manufacturer and distributor of drilling mud and other products used in the oil industry. Gaspard's employment responsibilities included directing the ordering, purchasing, and receiving of materials to Baroid from outside vendors and insuring the distribution of Baroid products to its customers.

The twelve counts on which Gaspard was convicted[1] may be divided into three groups. Counts I through V deal with Gaspard's majority ownership of South State Oil & Gas ("SSOG"). These counts

allege that Gaspard defrauded Baroid by Buying diesel for SSOC [sic] , storing that fuel in Baroid's own tanks, and then "selling" that diesel to Baroid at a higher price. Counts VI through X concern Gaspard's operation of Ed's Tank Cleaning Service and Cajun Tank Cleaning. According to the indictment, Gaspard used Baroid employees (often while they were on duty to Baroid) then billed Baroid for the services supposedly performed by Ed's Tank Cleaning. Counts XV and XVI allege that Gaspard had concrete poured at the homes of relatives, approved the concrete invoices as having been received by Baroid, and then cause Baroid to pay for the concrete. All twelve counts alleged use of the mails to accomplish these aims.[2]

II. Sufficiency of the Evidence

In addition to showing use of the mail in a mail fraud case, the government

must show a scheme or artifice to defraud. This Court has held that the mail fraud statute extends to situations in which an employee intentionally fails to disclose information material to his employer that he has a duty to disclose. See United States v. Ballard, 663 F.2d 534 (5th Cir. 1981) (focusing on duty to disclose and materiality). In addition, the government must show that "the violation of [the] fiduciary duty, though an act of fraud within the meaning of the statute, [is] coupled with the additional findings that the defendant devised a scheme to defraud and did so with specific intent to defraud." United States v. Goss, 650 F. 2d 1336, 1346 (5th Cir.1981).

Gaspard's main contention is that although he may well have breached a fiduciary duty to Baroid in operating SSOG

and Ed's Tank Cleaning, the evidence was insufficient to show that he intended to conceal or misrepresent his involvement with SSOG or Ed's Tank Cleaning. Instead, Gaspard contends, the evidence shows that Baroid officials knew of his involvement with SSOG and Ed's Tank Cleaning and that Baroid gave tacit, if not explicit, approval.

In reviewing the sufficiency of the evidence, this court is to determine whether, considering the evidence in the light most favorable to the government, "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir.1982) (en banc). Further, the jury may infer an intent to defraud from all the facts and circumstances surrounding the transaction. United States v. O'Keefe, 722 F.2d 1175,

1181 (5th Cir.1983). An examination of the record reveals more than adequate evidence to support the jury's determination regarding Gaspard's ownership of SSOG on this standard. Baroid's work required a great amount of diesel. Gaspard served as a district operating supervisor until his termination on November 12, 1982. From January 1981 to October 1982, Gaspard purchased diesel for Baroid from Gaspard's own company (SSOG). The testimony at trial indicated that Gaspard would buy diesel in the name of SSOG, have it delivered to Baroid's own tanks, and then sell it (again in the name of SSOG) to Baroid at a profit. See Rec. Vol. IV, at 183; Vol. V, at 301; Vol. IV, at 122; Vol. V at 360. By the admission of Gaspard's son, SSOG had little or no physical assets; it had no fuel tanks,

hoses, or trucks. Rec.Vol. V, at 301. The jury also had before it evidence showing that Gaspard had failed to obtain company permission to sell fuel to NL Baroid. When initially confronted with his ownership of SSOG, Gaspard stated that he had received such authority in a letter from Baroid supervisor Tom Parker, but was unable to produce the letter.[3] Rec.Vol. III at 8-9. While Gaspard contends that his supervisors knew of his ownership of SSOG, this testimony was impugned by convincing evidence that Gaspard had paid or offered "kickbacks" to a number of company supervisors.[4] Furthermore, these supervisors were only Gaspard's immediate supervisors in the area. On the other hand, Robert E. Killion, regional manager for Baroid and Gaspard's highest-ranking supervisor to testify, stated that he had neither given permission to Gaspard to

sell diesel to Baroid nor had any knowledge of Gaspard's ownership of SSOG. Rec.Vol. V at 370-71. A fair reading of the record indicated that, while some of the local supervisors (tainted or otherwise) may have known of Gaspard's activities, there is no indication in the record that any of the supervisors outside of the immediate area had such knowldege or gave such consent. Finally, when Baroid did find out about Gaspard's ownership of SSOG, it did not react as a company "which had known all along" but instead moved quickly to terminate Gaspard. See Rec.Vol. III at 12.

There is also more than adequate evidence to uphold the jury's convictions on Counts VI through X (Ed's Tank Cleaning) and XV through XVI (concrete pouring). Gaspard used Baroid employees

(often on Baroid's time) to clean tanks with Baroid equipment. He then submitted bills to Baroid for the services as if they had been performed by an independent contractor. Baroid investigator William Edwards testified that Gaspard told him that he had stopped Ed's Tank Cleaning "because he [Gaspard] felt that he was doing something wrong." Rec.Vol. III at 10. As for the concrete pouring counts, the evidence demonstrated that Baroid had paid for the concrete poured at the homes of Gaspard's relatives and that Gaspard had attempted to cover up at least one of these payments by repaying the cement contractor after the investigation had begun. Rec.Vol. IV at 217-19, 236.

III. Improper Jury Argument

Gaspard challenges three statements made by the prosecutor during closing argument. Since Gaspard failed to object,

this Court reviews the statements under the "plain error" standard, that is, whether any error that may have been committed affected the substantial rights of the defendant. See Fed.R.Crim.P. 52(b); United States v. Garza, 608 F.2d 659, 665 (5th Cir.1979).

The third statement challenged is the only one that merits consideration. This third statement by the prosecutor related to a letter, allegedly signed by Travis Kieffer, one of Gaspard's superiors. The letter acknowledged that Gaspard was selling diesel to Baroid through SSOG. Rec.Vol. V at 299-300. As it was noted earlier, the letter, found two or three days before trial by Gaspard's son, was of somewhat questionable authenticity. See note 4 supra. Arguing this point to the jury, the prosecutor contended: " [The

letter] is a paste up. This is a phony. It's a fraud ... Well, I think I was wrong because now there's a fourth scheme, a fourth fraud, and that is this bogus letter, the fourth scheme [.] [B] ut now there's a new victim. And who's the victim now? I submit to you, ladies and gentlemen , you are." Defendant's Brief at 35-36.

Although this statement is objectionable,[5] it does not amount to plain error in the context of the case at bar. The statement does not indicate that the government was indeed charging Gaspard with a fourth fraud nor did the prosecutor imply that he had some special knowledge that Gaspard had committed an additional crime. Cf. United States v. McPhee, 731 F.2d 1150, 1152-1153 (5th Cir.1984) (argument improper where prosecutor implied he had special knowledge that

defendant committed additional crimes). Further, the evidence particularly with regard to Counts VI through X and XV through XVI is strong such that the argument did not prejudice Gaspard's right to a fair trial See id. at 1152.

IV. Admission of Evidence

Gaspard challenges the introduction of a summary and chart into evidence and contends that its introduction is reversible error. The chart served as an aid to the testimony of FBI agent Owen Odom, who summarized evidence previously introduced through other witnesses. Rec. Vol. IV at 245-52. While the district court may have erred in admitting the chart into evidence or in failing to give a cautionary instruction. See J. Weinstein, Evidence ¶1006 [07] (1983), any error that may have been committed is

not reversible. Agent Odom's testimony concerned the magnitude of Baroid's loss on each of the three sets of counts. See Rec.Vol. IV at 247-50. The precise magnitude of the loss is not crucial, and the evidence is overwhelming that Baroid suffered a loss on each of the three sets of counts of the indictment.

V. Conclusion

The Court has examined Gaspard's other grounds of error and finds that they do not constitute reversible error. Accordingly, the judgment of the district court is

AFFIRMED.

Foot Notes:

1. Originally there were sixteen counts in the indictment. Counts XI through XIV were severed from the twelve counts at issue here and were dismissed without prejudice after the instant conviction. See Rec.Vol. II at 232-34.

2. Gaspard, for the first time on appeal, argues that Counts I through X are insufficient in failing to allege the elements of mail fraud. This argument is without merit. This Court has explicitly held that the essential elements of an indictment for mail fraud are "(1) a scheme to defraud (2) which involved a use of the mails (3) for the purpose of executing the scheme." United States v. Kent, 608 F.2d 542, 545 (5th Cir.1979) cert. denied, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980). See also United States v. Freeman 619 F.2d 1112 (5th Cir.1980), cert. denied sub. nom., Patrick Petroleum Corp. of Michigan v. United States, 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981). Contrary to Gaspard's contentions, the Court has held that the "indictment need not specifically charge, but the government must prove 'a specific intent to commit fraud.' " Freeman, 619 F.2d at 1117 (quoting Kent, 608 F.2d 545 n. 3). See also United States v. Goss, 650 F.2d 1336, 1346 (5th Cir.1981). The indictment here meets the Kent-Freeman standard.

Even if Kent-Freeman did not apply, however, the indictment is sufficient. Since Gaspard did not challenge the indictment below, this Court will reverse only if the indictment "cannot within reason be construed to charge a crime." United States v. Cauble, 706 F.2d 1322, 1333 n. 25 (5th Cir.1983), cert. denied, ------- U.S. -------, 104 S.Ct. 966, 79 L.Ed.2d 229 (1984). Although Gaspard contends that the indictment fails to allege concealment or specific misrepresentation, Counts I through V

clearly alleged that Gaspard formed the SSOG scheme "intending to ... defraud and to obtain money under false and fraudulent pretenses...." Rec.Vol. I at 3. Likewise, Counts VI through X charged that Gaspard "devised a scheme and artifice to defraud...." Id. at 7. From this, a fair reading of the indictment shows that Gaspard was fairly informed of all elements of mail fraud, including the specific intent to defraud. Id. at 1333. See also United States v. Howell, 719 F.2d 1258, 1261 (5th Cir.1983) (indictment sufficient where it states essential elements of offense and gives sufficient notice so that defendant may prepare his defense).

3. A different letter, signed by a Baroid district manager, Travis Kieffer, stated that Gaspard's ownership of SSOG was know to some supervisors, but the letter was of questionable authenticity. See Rec.Vol. V at 273-75.

4. Gaspard's immediate supervisor, Woodrow Wilson, testified Gaspard gave him a check for a kickback. Rec.Vol. IV at 148-50; Rec.Vol. III at 12. Gaspard also offered a kickback to supervisor Travis Kieffer. Rec.Vol. V at 273. District Manager Thomas Parker stated that he had never given Gaspard permission to sell diesel to Baroid and had no direct knowledge of Gaspard's sales to Baroid through SSOG. Rec.Vol. IV at 134, 139. Operations Manager Dayton King, whose office was in Lafayette, testified that he had "heard" that Gaspard was selling diesel to Baroid but at no time granted permission for Gaspard to do so. Rec.Vol.

V at 315-16.

5. At oral argument in the instant appeal, the court urged the government's counsel to take action so that statements such as the one here----which puts the jury in the role of the victim----are not made. The Court's ruling here that such argument does not amount to plain error does not condone such appeals to the jury.

6. Gaspard also contends on this appeal that the admission of two other charts constitutes reversible error. These charts illustrate Baroid's invoice processing and SSOG's purchase and sales. Gaspard's counsel failed to object. This Court reviews the admission of the charts on the "plain error" standard. United States v. Lacoste, 721 F.2d 984, 988 (5th Cir.1983). No such error was committed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-4233

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

NEWTON GASPARD,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR HEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/09/84, 5 Cir., 198__, _____F.2d___)

(November 7, 1984)

Before GARZA, Senior Judge, REAVLEY and JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the Court be polled on rehearing en banc, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/SAM JOHNSON
United States Circuit Judge
11/5/84 REHG-6

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